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cannot be amended after the adjournment of the term to show that it was made by the consent of the parties entered of record; there being nothing in the record by which the amendment can be made.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.\* 5 Va.-W. Va. Enc. Dig. 388.]

**3. Courts (§ 116\*)—Records—Amendment—Power of Court.**—During the term of a court at which a judicial act is done the record remains in the breast of the court, and may be altered or amended; but after the adjournment of the term amendments can only be made in cases in which there is something in the record by which they can be safely made, and not on the individual recollection of the judge, or on evidence aliunde.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 372; Dec. Dig. § 116.\* 1 Va.-W. Va. Enc. Dig. 349.]

Error to Circuit Court, Buckingham County.

W. Dallas Wright was convinced of murder, and brings error. Affirmed.

*Jno. L. Lee, A. E. Strode, and A. S. Hall*, for plaintiff in error. *Samuel W. Williams, Atty. Gen.*, for the Commonwealth.

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PORTSMOUTH COTTON OIL REFINING CORPORATION *v.*  
OLIVER REFINING CO.

Jan. 12, 1911.

[69 S. E. 958.]

**1. Judgment (§ 570\*)—Bar of Action—Retraxit.**—A plaintiff, who brought suit in the courts of a sister state to recover from defendant and a third person on a cause of action, and who was allowed to dismiss the action as to defendant, with costs to defendant, on his motion, alleging the ground that it had discovered that it was not entitled to recover in the action against defendant, and had no claim against defendant, but that it looked solely to the third person, was not thereby barred from subsequently suing defendant on the same cause of action; the facts not amounting to a retraxit, but only to a discontinuance against defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1045; Dec. Dig. § 570.\* 4 Va.-W. Va. Enc. Dig. 704, 723.]

**2. Contracts (§ 169\*)—Construction.**—The court, in construing an agreement, must look at the language employed, the subject-matter, and the surrounding circumstances.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. § 169.\* 7 Va.-W. Va. Enc. Dig. 858, et seq.]

**3. Sales (§ 89\*)—Contracts—Construction.**—A contract for the

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

sale of a cotton oil refining plant was entered into by the seller and an agent of the buyer. The sale included stock in trade. Subsequently the seller, the buyer, and the agent entered into an agreement for the settlement of matters, and pending the adjustment of the matters it was agreed that the personal property on the premises should be delivered to the agent as the original purchaser, and that the amounts, if any, due to the agent, the buyer, or the seller, should be promptly paid. The stock in trade was not taken possession of by the agent, but was delivered by the seller at the buyer's plant, and consumed by the buyer. The unsettled matters between the parties were not adjusted. Held, that the agreement between the seller, the buyer, and the agent did not relieve the buyer of liability to pay for the stock in trade.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 251; Dec. Dig. § 89.\* 3 Va.-W. Va. Enc. Dig. 417.]

**4. Appeal and Error (§§ 1050, 1056\*)—Questions Reviewable—Rulings on Evidence—Material Questions.**—Where the right of the successful party to recover would not have been affected if the evidence offered by the defeated party and excluded by the court had been admitted, and if the evidence received over the defeated party's objection had been excluded, the rulings on the admission and exclusion of the evidence would not be reviewed on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153, 4187; Dec. Dig. §§ 1050, 1056.\* 1 Va.-W. Va. Enc. Dig. 592. 595.]

**5. Appeal and Error (§ 1068\*)—Questions Reviewable—Immaterial Questions—Instructions.**—Where, on the case made and offered to be made, no other verdict than the one found could have been properly rendered on correct instructions, the question whether the court erred in giving, amending, and refusing instructions will not be considered on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.\* 1 Va.-W. Va. Enc. Dig. 600, 604.]

Error from Circuit Court, Norfolk County.

Action by the Oliver Refining Company against the Portsmouth Cotton Oil Refining Corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

*J. W. Willcox*, for plaintiff in error.

*Cadwallader J. Collins* and *E. R. F. Wells*, for defendant in error.

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.